

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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<b>Cambridge Electric Light Company</b>	)	<b>D.T.E. 04-60</b>
<b>Commonwealth Electric Company</b>	)	
<b>d/b/a NSTAR Electric</b>	)	
_____	)	

**REPLY BRIEF OF  
THE MASSACHUSETTS ATTORNEY GENERAL**

Respectfully submitted,

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**REPLY BRIEF OF THE ATTORNEY GENERAL**

**I. INTRODUCTION**

Pursuant to the procedural schedule issued by the Hearing Officer, the Attorney General files this Reply Brief to respond to arguments in the Initial Briefs submitted by Cambridge Electric Light Company and Commonwealth Electric Company (the “Companies”), together with Boston Edison Company, d/b/a NSTAR Electric (“NSTAR Electric”), and Pittsfield Generating Company, L.P. (formerly known as Altresco Pittsfield, L.P.) (“Pittsfield”) on August 12, 2004. This brief is not intended to respond to every argument made or position taken by the Companies or Pittsfield. Rather, it responds only to the extent necessary to assist the Department of Telecommunications and Energy (“Department”) in its deliberations, i.e., to provide further information, to correct misstatements or misinterpretations, or to provide omitted context. Therefore, silence by the Attorney General in regard to any particular argument in another party’s brief should not be interpreted as assent.<sup>1</sup>

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<sup>1</sup> The Attorney General also reserves his right to respond to the Companies’ and Pittsfield’s Reply Briefs. G.L. c. 30A § 11(1).

## **II. THE DEPARTMENT SHOULD REJECT THE COMPANY'S PETITION BECAUSE THE COMPANY HAS FAILED TO MITIGATE TRANSITION COSTS TO THE MAXIMUM EXTENT.**

The Department should reject the Companies' Petition because they failed to mitigate transition costs to the maximum extent as required by the Restructuring Act. G.L. c. 164 §1G(d)(1) (the "Restructuring Act"). According to the Restructuring Act, mitigation efforts in which the Company shall engage shall include (1) good faith efforts to renegotiate, restructure, reaffirm, terminate or dispose of existing contractual commitments for purchased power which exceed the competitive market price for power; (2) examination and analysis of the historic level of performance over the life of contractual commitments for purchase power, regardless of whether or not they exceed the competitive market price; (3) any other mitigation and analytical activities the Department determines to be reasonable and effective mechanisms for reducing identifiable transition costs. G.L. c. 164 §1G(d)(1)(ii), (iii), (vi).

In September 2003, circumstances changed in Pittsfield's operation of the generating unit and the Companies' customers started paying more in stranded costs. Tr. 1, p. 182. When this significant change in the unit's output occurred, the Companies did not pursue various alternatives under the existing Pittsfield contracts to mitigate these increased stranded costs. Pittsfield argues at length in its Initial Brief that termination options available to the Companies under the existing Pittsfield contracts were limited (*see* Pittsfield's Initial Brief, pp. 22-27).<sup>2</sup> Pittsfield's arguments, however, are those of a party who only stands to gain from the

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<sup>2</sup> The Attorney General is asking the Department to strike part of Pittsfield's brief in his Motion to Strike Portions of Pittsfield Generating Company's Initial Brief, filed with the Department August 17, 2004.

Department's approval of the Petition<sup>3</sup> and the Department should give those arguments less weight.

The Companies' Initial Brief, like its original Petition, fails to show that the Company exhausted all its options before signing the Pittsfield termination agreements, thus truly mitigating transition costs to the maximum extent possible. The Companies were slow to recognize the negative impact the termination of USGen New England's contract with Pittsfield and subsequent alteration of Pittsfield's operating practices had on customers. Other than one letter to Pittsfield four months after its customers were paying more (see Exh. AG-1-1(u)), the Companies did nothing to determine how to resolve its dispute with Pittsfield, choosing instead to resolve it by entering into the buyout agreement that results in only minor savings to customers. Tr. 1, pp. 182-183. Although the Companies may have mitigated some transition costs with this buyout transaction, the Companies have not proven that the mitigation was to the maximum extent as required by the Restructuring Act. G.L. c. 164 §1G(d)(1). Therefore, the Department should reject the buyout and cost recovery.

### **III. THE DEPARTMENT SHOULD DISREGARD PITTSFIELD'S CLAIMS REGARDING ISSUES OF CONTRACT INTERPRETATION AND BREACH.**

The Department should disregard Pittsfield's arguments regarding contract breach and Pittsfield's legal interpretation of the parties' rights under the existing contracts. The Hearing Officer limited the scope of the proceedings:

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<sup>3</sup> If the Department approves the Companies' Petition, Pittsfield will receive approximately \$85 million dollars over the next four years with no obligations to perform under the existing contracts and no threat of arbitration or litigation by the Companies. See NSTAR-1, Appendix A and B.

[t]he question of whether or not Altresco's current operation of the system, at the capacity factor at which [Pittsfield is] currently operating the system, and the question of whether or not that's a breach, that's a legal question and that's not one we're going to determine here. In addition, the witnesses are not qualified to interpret the contract here. So I would not allow questions that interpret the contract, because they are not lawyers.

Tr. p. 194. Pittsfield's Initial Brief includes numerous arguments regarding the issues that the Hearing Officer explicitly excluded from consideration during this proceeding. *See* Pittsfield Initial Brief, pp. 9-10, 14-15, 21-27. For Pittsfield to now include these issues in its brief when the Department barred the Attorney General from exploring them during cross-examination is unfair and prejudicial to the Attorney General. Indeed, Pittsfield bases some arguments on facts not in evidence that the Department should disregard altogether.<sup>4</sup>

Pittsfield erroneously attributes arguments to the Attorney General regarding specific interpretations of the existing contracts that are not in his Initial Brief. Rather, the Attorney General simply argues that the Companies failed to prove that the termination agreements represent the maximum mitigation required by the Restructuring Act. The basis for this argument is the fact that there is an outstanding credible contract dispute that the Companies failed to evaluate and pursue further, to the detriment of its customers.<sup>5</sup> Tr. 1, pp. 183-184.

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<sup>4</sup> The Attorney General addresses this in more detail in his Motion to Strike Portions of Pittsfield Generating Company's Initial Brief, filed with the Department August 17, 2004.

<sup>5</sup> The Companies could have explored options including (1) filing a formal demand to Pittsfield to dispatch the unit as the Companies require, as Pittsfield, apparently, had been doing prior to September 2003; (2) calling for arbitration under Article 12 of the contracts (NSTAR-CAM-GOL-1 and NSTAR-COM-GOL-1); and (3) petitioning the Department, under *Tenaska/Commonwealth*, to provide guidance on protecting customers' welfare and an advisory opinion as to what issues were appropriate for arbitration (*Tenaska/Commonwealth*, D.P.U. 91-200, pp. 2-3 (1993), *citing Commonwealth Electric Company v. Tenaska Mass, Inc.*, Civil Action No. 91-8017 (1992)). The Companies did none of these things.

Pittsfield, in defending its obligations under the existing contracts, places a great deal of importance on fact that, under the existing contracts, the Companies do not have an entitlement to a specific capacity factor (see Pittsfield's Initial Brief, pp. 10-13). Pittsfield's argument suggests that Cambridge and Commonwealth negotiated contract terms that would cost customers over \$24 million a year (see NSTAR-CAM-GOL-1 and NSTAR-COM-GOL-1) without the promise of delivering a single kilowatt hour ("kWh"). A more reasonable explanation for the terms of the existing contracts is that the Companies negotiated flexible contract terms that would allow them to dispatch the unit to serve their changing energy requirements over the twenty years the contract would be in effect.

In claiming that the Companies do not have the right under the existing contracts to dispatch the unit, Pittsfield relies on a single reference in the contract that "...the Unit will be subject to Economic Dispatch at the sole direction of NEPOOL..." *Id.* p. 21, n. 15, *citing* NSTAR-CAM-GOL-1/NSTAR-COM-GOL-1, Article 4.1. When NSTAR Electric requested that the unit be dispatched at higher levels in January 2004, it sent the letter to Pittsfield, not to NEPOOL. In any case, NEPOOL no longer dispatches generating units, ISO-NE does, however, and the existing contracts provide for a situation where NEPOOL may cease to operate as it had at the time the contracts were signed.<sup>6</sup> Several other sections of the contract support the Companies' role as are the primary dispatching agent under the existing contracts.<sup>7</sup> *See* Exhs.

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<sup>6</sup> Under Article 17, Miscellaneous Provisions, the Companies could "impose reasonable substitute standards that do not materially alter the obligations of the Seller as the obligations existed under the NEPOOL standards." NSTAR-CAM-GOL-1/NSTAR-COM-GOL-1, Article 17.4, p. 15.

<sup>7</sup> Article 17.4 provides that any successor to Pittsfield must assure that the Companies' "right to receive the electric output of the Site and Unit pursuant to the terms of this Agreement shall apply...";

NSTAR-CAM-GOL-1 and NSTAR-COM-GOL-1. Therefore, the Department should disregard Pittsfield's assertion that under the existing contracts only NEPOOL, and not the Companies, may dispatch the unit.

#### IV. CONCLUSION

**WHEREFORE**, for all of the foregoing reasons, the Attorney General requests that the Department reject the Companies' Petition and require the Companies to initiate the actions set forth above that mitigate the above market costs of the Pittsfield contracts to the maximum extent.

Respectfully submitted,

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Article 1, Definitions, defines Economic Dispatch as "the operation of the Unit in accordance with such procedures as may be established by NEPOOL from time to time to foster the objective of satisfying the energy requirements of the participants of NEPOOL at the lowest practicable cost."  
*See Exhs. NSTAR-CAM-GOL-1 and NSTAR-COM-GOL-1.*